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THE DUTY TO SETTLE IN WTO DISPUTE SETTLEMENT

*Chios Carmody**

ABSTRACT

WTO disputes form an important part of the way we think about WTO law today. Nevertheless, given the fact that virtually all of the disputes must, at some point or other, settle, this article argues that an important — and perhaps even pre-eminent — aspect of WTO law is the law of settlement. There is an actual duty on parties in WTO law to resolve the cases they are involved in. This is not a “hard” obligation in the sense of having to achieve a specific result, but rather one of a softer, process-oriented variety. This article examines the law of negotiation and settlement in domestic labour law and Aboriginal law as a prelude to examining the extent of this duty as developed in U.S. – Shrimp and U.S. – Continued Suspension.

KEYWORDS: *WTO, international law, disputes, settlement, cooperation*

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I. INTRODUCTION

Thinking about WTO law today is dominated by WTO dispute settlement. Since the WTO's system of dispute settlement was first activated 15 years ago the system has rendered over 300 decisions, appeals and arbitration awards. These have provided both the dispute settlement system and commentators with an illuminating source of jurisprudence on many key points of WTO law.

At the same time, the spectacle of WTO dispute settlement has provided the global public with imagery akin to that of private litigation. Dispute settlement features identifiable “claimants” and “defendants”, rules of procedure, requirements of evidence, written decisions, appeals, and perhaps most importantly, remedies, or trade “sanctions”, that infer the legal system actually has “teeth”. Taken together, these elements infer that what the dispute settlement system has created is a trade “court”, and indeed, WTO dispute settlement has been popularly described as such.¹

The paradigm of litigation casts a long shadow on thinking about WTO law at present. There is an implicit emphasis on the law's tactical and polemical aspects. Virtually every report begins with ritual references to the standard of review, the burden of proof and treaty interpretation.²

This emphasis on litigation and adversarialism — on “*dispute settlement*” — is at odds with another, less noted, aspect of WTO law — that of “*dispute settlement*”, the duty on WTO member countries to cooperate in resolving their differences.³ This duty announces itself in general terms in DSU Article 3.10, which requires that countries “engage in dispute settlement procedures in good faith *in an effort to resolve the dispute*.” Indeed, I will argue in this article that the objective of resolving disputes is conceptually primate in the treaty and subsists throughout the entire course of WTO litigation. As the arbitrator in *U.S. – 1916 Act* (22.6) observed, “this obligation [to resolve disputes] applies to *all stages* of the dispute, including during the implementation of the suspension of obligations.”⁴ Thus, the popular polemical image of WTO law is matched

¹ For instance, see Global Exchange, *The WTO Erodes Human Rights Protections — Three Case Studies* (1999), <http://www.globalexchange.org/campaigns/wto/CaseStudies.html> (last visited Feb. 22, 2011).

² These are all matters of vital interest to lawyers that the WTO Agreement itself is largely silent about and which have had to be defined, and refined, by panels under the guidance of the Appellate Body. See reference to this trinity of issues in Panel Report, *U.S. – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R (Oct. 1, 2008).

³ Negotiating Group on Dispute Settlement, *Note by the Secretariat: Concept, Forms and Effects of Arbitration*, MTN.GNG/NG13/W/20 (Feb. 22, 1988); the term “dispute” is defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion by one party is met with refusal, counterclaim or denial by another. Award of the Arbitrators, *United States – Section 110(5) of the U.S. Copyright Act*, n. 27, WT/DS160/ARB25/1, (Nov. 9, 2001).

⁴ Decision by the Arbitrators, *U.S. – Anti-Dumping Act of 1916*, ¶ 9.1, WT/DS136/ARB (Feb. 24,

by an irenical counterpart.

Traditionally, however, little attention is paid to the duty to settle. This is because of the overwhelming emphasis in WTO law on litigation and because resolution of these complex disputes usually takes place “off-stage”, that is, out of the public eye, many years after the dispute actually commences. We tend to forget, or be uninterested in, the peaceful and cooperative aspects of inter-state behaviour. They are routine and humdrum, lacking in colourful histrionics that make litigation so compelling. What grabs our attention is the ongoing parade of disputes and the political theatre associated with them. Disputes like *Bananas*, *Hormones*, *1916 Act*, *Pharmaceuticals*, *Cotton*, and *Sugar* have each garnered interest with their hyperbolic claims and had their “day in the sun”. Less often do we pause to consider the fact that the real outcome of these cases is settlement.

Recently, this settlement function has received some attention in the course of settling two longstanding WTO disputes, *EC – Bananas* and *EC – Hormones*. What I want to suggest in this article is that *unlike* domestic private litigation, there is an actual *obligation* on parties in WTO law to resolve the cases they bring. This is not a “hard” obligation in the sense of having to achieve a specific result, but rather one of a softer, process-oriented variety. Countries are required to engage with each other, to put adequate resources towards the effort to settle, and to conduct themselves in the negotiations in good faith. By comparison, domestic litigation may favour settlement, but rarely does it *oblige* settlement. Instead, as will be discussed, domestic litigation imposes obligations on lawyers, rules concerning offers, costs consequences and other devices, to move parties towards a resolution. WTO law goes a step or two further. It recognizes the greater value in having parties actually resolve their differences.

Why? The obligation to settle disputes is attributable to an overarching communitarian ethos that permeates the WTO Agreement. The treaty creates a “community” of like-minded member countries which appreciate — if not always expressly — that the community provides certain key benefits that would be missing in the absence of agreement. The chief benefit of the trade regime is certainty: it affords governments and individuals the certainty of knowing that they will be treated in a certain way.⁵ That certainty is likely to be disrupted, however, by disputes. The

2004).

⁵ See, for instance, Panel Report, *China – Measures Affecting Imports of Automobile Parts*, ¶ 7.460, WT/DS339 (July 18, 2008) (“[T]he *main purpose and objective* of the WTO Agreement and the GATT 1994 is to maintain the security and predictability of reciprocal market access arrangements manifested in tariff concessions. This, in our view, means that tariff concessions must be interpreted to benefit both the importing Member, China, and exporting Members.”) (emphasis added). There are other references in WTO case law to the importance of “security and predictability”; for instance, see Panel Report, *Argentina – Measures Affecting Imports of*

treaty therefore stresses the need for members to reconcile and resolve their differences, preferably in a way that is acceptable to the parties and the WTO membership at large. Thus, countries do not fight simply to fight to vindicate their *own* interest — as the polemical record might infer. They fight and settle their disputes in a bid to further the common interest protected under the treaty.

This obligation to settle may appear exceptional, but I will also argue that it is simply a manifestation of a greater obligation to cooperate identifiable in the law of many international organizations. The obligation is sometimes explicitly mentioned in IO constitutive instruments, such as Article 2.2 of the U.N. Charter which requires that “all members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.”⁶ Likewise, in the law of the European Union (EU) there exist a number of clauses laying down duties of cooperation, often referred to as duties of “community solidarity”, on member states (*Gemeinschaftstreue*) and on EU organs (*organtreue*) that go beyond the normal obligation to fulfil treaties in good faith.⁷ EU states and organs must constantly remain aware of the need to act in a general way that reinforces the underlying notion of community.⁸ Something similar occurs in WTO law.

The neglect of this vitally important subject — the duty to settle — is also due, at least in part, to the sense of disappointment and “failure” that pervades the WTO today. In the public mind, if not the academic mind, there is an overwhelming emphasis on the conclusion of “grand” multilateral rounds of negotiations like the one concluded at Marrakesh in April 1994. At that time the Uruguay Round led to the creation of the WTO Agreement. The current round, the Doha Development Round, has been ongoing since November 2001 and for many reasons, including ad hoc deal-making, the proliferation of regional trade agreements, and continuing

Footwear, Textiles, Apparel and Other Items, ¶ 6.68, WT/DS56/R (Nov. 25, 1997); Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, ¶ 7.154, WT/DS103, 113/R (May 17, 1999); Appellate Body Report, *EC – Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5 of the DSU by Ecuador / Recourse to Article 21.5 of the DSU by the United States*, ¶ 483, WT/DS27AB/RW2/ECU and USA (Nov. 26, 2008) [hereinafter *EC – Bananas Appellate Body Report*].

⁶ See discussion of the duty to cooperate in HENRY SCHERMERS & NIELS BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* 108 (1995).

⁷ See John Temple Lang, *Community Constitutional Law: Article 5 EEC Treaty*, 27 COMM. MKT L. REV. 645 (1990).

⁸ As Jan Klabbers puts it, “Much in the same way as marriage is somehow more than a mere contractual arrangement, so too the creation of an organization is an act which involves not just the normal good-faith duty to give effect to one’s commitments, but also a spirit of loyalty, camaraderie and mutual respect.” JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* 176 (2d ed., 2009).

differences over agriculture subsidies, there is little sign of its imminent conclusion. Consequently, the entire treaty system seems to be clouded by the fog of failure. This has, I will argue, bred an underlying sense of dissatisfaction with the WTO system, as if it had accomplished nothing.

Too rarely is there real recognition of the tremendous amount that *has* been achieved. We do not pause to consider the many “small” settlements and agreements that have resulted from individual disputes. Notwithstanding the failure of Doha to date, there are hundreds of them.⁹ Many specialists of WTO law will be familiar with the 2001 *Doha Declaration on Public Health* and the 2003 *Decision on Paragraph 6*.¹⁰ Fewer, perhaps, will be aware of the way in which the WTO and its dispute settlement system have been used for creative purposes to settle differences over fishing management and wildlife protection, pesticide residues and aircraft financing. WTO disputes have also had follow-on effects elsewhere, for instance in UNESCO and the OECD.¹¹ These follow directly from the obligation to settle under WTO law and need to be remembered. This experience must be considered in evaluating the success of the WTO as a treaty and as an international organization.

II. THE NATURE OF WTO DISPUTE SETTLEMENT

The obligation to settle in WTO law emanates from the special nature of both WTO law and WTO dispute settlement. Whatever else may be said about its many purposes, the chief purpose of WTO law is the “stability and predictability” of concessions and commitments made under the WTO Agreement.¹² This is often assimilated within the concept of the “protection

⁹ For instance, see the Mutually Agreed Solution [hereinafter MAS], *Korea – Measures concerning the shelf-life of products*, G/AG/W/8/Add.1 (Nov. 24, 1995); Minutes of the DSB meeting, *United States – Imposition of imports duties on automobiles from Japan under Section 301 and 304 of the Trade Act of 1974*, WT/DSB/M/6 (Aug. 28, 1995); MAS, *Korea – Measures Concerning Bottled Water*, G/AG/W/14/Add.1 (May 6, 1996); Panel Report, *EC – Trade Description of Scallops*, WT/DS7/12 (July 19, 1996); Panel Report, *Japan – Import Quotas on Dried Laver and Seasoned Laver*, WT/DS323/5 (Jan. 27, 2006). These settlements have themselves occasionally been the subject of WTO dispute settlement; see *EC – Bananas* Appellate Body Report, *supra* note 5, ¶¶ 433-35. In that case, the arbitrator found that a temporary waiver regulating the EC’s banana quota could not be interpreted to modify the EC’s existing tariff commitment on bananas.

¹⁰ See World Trade Organization, Ministerial Declaration of 20 November 2001, WT/MIN(01)/DEC/2; World Trade Organization, Ministerial Declaration of 2 September 2003, WT/L/540.

¹¹ For instance, see Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 3-21, 2005, 45 I.L.M. 269, which was prompted, at least in part, by the outcome in Panel Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R (Mar. 14, 1997), and the *Aircraft Sector Understanding on Export Credits for Civil Aircraft*, OECD Doc. TAD/PG(2007)4/FINAL (2007) which was prompted, at least in part, by the *Brazil/Canada – Aircraft* dispute.

¹² See SCHERMERS & BLOKKER, *supra* note 6. A further illustration was provided by the panel in Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, ¶ 7.274,

of expectations”.¹³ Accordingly, WTO law is understood to protect expectations about the trade-related behaviour of governments, something which has been interpreted as constituting a “public good” belonging to the entire membership.¹⁴

The “public good” character of concessions and commitments had consequences for dispute settlement. The historical record indicates that the system which arose evolved naturally from the need identified under GATT to resolve differences between countries. Originally, this took the form of working parties set up to examine disputes between contracting parties. Later, it developed more of a litigation-based approach that, as Robert Hudec related, “satisf[ied] the legal instincts of the GATT administrators”.¹⁵

The WTO dispute settlement system that came into being in 1995 was part of a larger administrative structure, the Dispute Settlement Body (DSB), whose function is to administer the WTO Dispute Settlement Understanding (DSU). The DSB is described as having: “[T]he authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of ruling and recommendations, and authorize suspension of concessions and other obligations”¹⁶

These references clarify that it is the DSB — not WTO panels or the Appellate Body — that has the ultimate authority and responsibility to discharge dispute settlement functions. The DSB fulfills these by meeting regularly and by referring specific differences raised by countries in those meetings to panels. These differences — referred to in WTO parlance as

WT/DS366/R (Apr. 27, 2009) [hereinafter *Colombia – Ports of Entry* Panel Report] where, in discussing the variable nature of the Colombian law at issue it noted: “When also considering the fact that the restrictions on port access have been imposed, extended and removed, then subsequently reinstated, importers’ expectations and planning have undoubtedly been affected, which has led importers to rearrange shipping schedules, in turn affecting scheduled importation of subject goods arriving from Panama. In the Panel’s view, all of these uncertainties, including access to one seaport for extended periods of time and the likely increased costs that would arise for importers operating under the constraints of the port restrictions, limit competitive opportunities for imports arriving from Panama.”

¹³ See Appellate Body Report, *EC – Customs Classification of Certain Computer Equipment*, ¶ 109, WT/DS62/AB/R (June 5, 1998); for application in the context of GATS, see Appellate Body Report, *U.S. – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 159-160, WT/DS285/AB/R (Apr. 7, 2005).

¹⁴ A public good is a good that is non-rivalrous and non-excludable. Non-rivalry means that consumption of the good by one individual does not reduce availability of the good for consumption by others; and non-excludability that no one can be effectively excluded from using the good. For further reference, see RAYMOND G. BATINA & TOSHIHIRO IHORI, *PUBLIC GOODS: THEORIES AND EVIDENCE* (2005).

¹⁵ ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 79 (2d ed., 1990).

¹⁶ Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, art. 2.1, Annex 2, Apr. 15, 1994, 33 I.L.M. 81 [hereinafter DSU].

“matters” — are the seed from which WTO disputes subsequently take life.¹⁷

The important point to be gleaned from this arrangement is that the task of panels and the Appellate Body is supplementary and assistive. DSU Article 11 makes clear that the function of panels: “is to assist the DSB in discharging its responsibilities”¹⁸ This is described in greater detail as follows: “[A] panel should make an objective assessment of the facts of the matter before it . . . and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.”

Not surprisingly, the traditional form of conclusion pronounced by a panel is styled a “recommendation”, which is habitually adopted by the DSB and constitutes the final pronouncement that countries must comply with.

The auxiliary, problem-solving character of panels has noteworthy consequences. Panels and the Appellate Body are not required to address every claim before them.¹⁹ In some instances, it appears that panels and the Appellate Body have judiciously avoided making findings that might aggravate a dispute.²⁰ And there is no way in WTO dispute settlement to address counterclaims.²¹ Thus, a number of the features of traditional litigation that presume the adjustment of rights among the parties *alone* are

¹⁷ The standard terms of reference for WTO dispute settlement panels is spelled out in DSU Article 7.1 as being “To examine, in light of the relevant provisions . . . the *matter* referred to the DSB” (italics added).

¹⁸ For instance, see references in Panel Report, *Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches*, ¶ 7.140, WT/DS238/R (Feb. 14, 2003).

¹⁹ This is made clear in references to “judicial economy”; *id.* ¶7.140. “Article 11 of the DSU provides that the Panel’s function is to assist the DSB in discharging its responsibilities under the DSU and the covered agreements. It does not require us to examine all the legal claims made by Chile. Our findings should assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. We are mindful of the approach of the Appellate Body in *U.S. – Wool Shirts and Blouses* that we need only address those claims which we consider necessary for the resolution of the matter between the parties. At the same time, we are mindful of the balancing consideration expressed by the same body in *Australia – Salmon* that a panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings in order to ensure effective resolution of disputes to the benefit of all Members.”

²⁰ A degree of circumspection can be observed, for instance, in Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (21.5), ¶ 7.169, WT/DS207/RW (Dec. 8, 2006) where a compliance panel found that Chile had failed to bring certain laws into compliance with the WTO Agreement and noted that “It would flow automatically that the measure is also in breach of Article XVI:4 of the WTO Agreement. Notwithstanding the above, we do not feel that such additional finding is necessary in order to resolve the dispute between the parties.” Likewise, in *Colombia – Ports of Entry* Panel Report, *supra* note 12, ¶¶ 7.290-92, where the panel decided not to examine claims under GATT Art. XIII:1 as this would not assist in resolving the dispute.

²¹ DSU Article 3.10 provides, “[i]t is understood that complaints and counter-complaints in regard to distinct matters should not be linked.”

missing. The focus of the system is squarely on resolving disputes to the benefit of members as a whole.

Several other provisions emphasize the dispute settlement system's collective and constructive nature. Perhaps the most important of these is DSU Article 3.3, which states that:

The *prompt settlement* of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between rights and obligations of Members.

DSU Article 3.4 also provides that "Recommendations or rulings made by the DSB shall be aimed at achieving a *satisfactory settlement* of the matter"

Nevertheless, parties are not entitled to cooperate in settling matters in any way that they please. Outcomes must meet some minimum threshold of acceptability. This is evident in DSU Article 3.5: "All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, *shall be consistent with those agreements*"

The WTO dispute settlement system is thus keyed to adjusting rights and obligations that belong, in some sense, to the *entire* WTO membership. The resolution of a dispute is really about much more than the parties' direct interests. It is about resolving differences that, if not settled, usually have an impact on the entire membership's common interest.²² This is perhaps most evident in DSU Article 3.6, which states: "Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, *where any member may raise any point relating thereto*."

The duty to settle is therefore to be understood as a duty emanating from the nature of the law and the nature of the dispute settlement system

²² For discussion of the way in which concessions made are considered the property of the WTO membership as a whole, see Panel Report, *EC – Customs Classification of Certain Computer Equipment*, ¶¶ 45-62, WT/DS62/R (Feb. 5, 1999). For further commentary, see Laurent Ruessmann, *The place of legitimate expectations in the general interpretation of the WTO Agreements* (K.U. Leuven Institute for International Law, Working Paper No. 36, Dec. 2002). The emphasis on the common expectations of the membership can be traced to the very basis of normativity in WTO law. In *U.S. – Oil Country Tubular Goods*, for instance, the Appellate Body expressed the view that a particular document "[h]as normative value because it provided administrative guidance and *creates expectations* among the public and among private actors." See Appellate Body Report, *U.S. – Oil Country Tubular Goods*, ¶ 187, WT/DS268/AB/R (Nov. 29, 2004).

that is oriented, first and foremost, at “settling” disputes. At the same time, settlement sits in delicate balance with the acknowledged need in the system to litigate between parties, normally configured as a dyadic pair. The two activities — “dispute” and “settlement” — are in tension and must be constantly balanced. The balance is, however, always oriented towards settlement.

This orientation is confirmed in the opening words of DSU Article 3.7, which state: “Before bringing a case, a Member shall exercise its judgment as to whether the action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a *positive solution* to a dispute.”

It has also been affirmed by panels and the Appellate Body. In *EC – Sugar*, for instance, the panel observed that: “the procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but the fair, prompt and effective *resolution* of trade disputes.”²³

And in *Australia – Salmon* the Appellate Body made clear that the aim of dispute settlement is “to resolve the matter at issue” and “to secure a *positive solution* to a dispute”.²⁴

This duty to settle is at odds with the general orientation of the law in private law litigation. In Canadian law, for instance, if cooperative duties are found, they are generally duties that parties owe to the *court*, not each other in some abstract, communitarian sense. To be sure, there are various duties for parties to cooperate in the process of litigation in terms of full disclosure and civility.²⁵ More generally, perhaps, there is an obligation not to engage in litigation that is frivolous or vexatious.²⁶ Costs consequences can be built in to the acceptance or rejection of certain offers.²⁷

²³ Panel Report, *EC – Export Subsidies on Sugar (Complaint by Australia)*, ¶ 7.6, WT/DS265/R (Oct. 15, 2004) (emphasis added).

²⁴ See Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R 223 (Oct. 20, 1998). The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and “to secure a positive solution to a dispute”. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings “in order to ensure effective resolution of disputes to the benefit of all Members.”

²⁵ In the Canadian province of Ontario, for instance, lawyer conduct is governed by the Rules of Professional Conduct of the Law Society of Upper Canada.

²⁶ The English doctrine of champerty, for instance, traditionally prevented strangers to lawsuits and litigants from concluding agreements to maintain, support or promote another person’s lawsuit. See ROBERT H. ARONSON & DONALD T. WECKSTEIN, PROFESSIONAL RESPONSIBILITY IN A NUTSHELL 271 (2d ed., 1991). This has now been modified in some jurisdictions. “An action may be vexatious if it is obvious that it cannot succeed . . . or if no reasonable person can possibly expect to obtain relief from it” *Foy v. Foy* (No. 2), 26 O.R. (2d) 220 (C.A.) 227 (1979).

²⁷ In the law of many jurisdictions, the law is structured so as to encourage, but not require, parties

Additionally, there are duties on parties not to aggravate the underlying situation that gives rise to the dispute, such as the doctrine of mitigation in contract.²⁸ Nevertheless, none of these specific duties amounts to a *duty* to settle. Parties are allowed to insist on the scrupulous observance of their rights.

Why? The explanation for the distinction between WTO and ordinary domestic litigation lies in the nature of the “community” that the law creates and contemplates. Domestic private law, in particular, is predicated upon a view of individuals as autonomous bearers of rights and obligations that are interchangeable. If one party breaches an agreement or commits a civil wrong, the solution is damages aimed at making the plaintiff whole.²⁹ In general, no ongoing injury to the remainder of the community is assumed. In Anglo-American contract law, this doctrine has been taken to its logical limit in the body of law that privileges damages over specific performance.³⁰

WTO law is different. It constantly assumes the parties are repeat players and that they have come together to protect a public “good” which the law creates via the Most Favoured Nation (MFN) obligation. The wider, communitarian vision that underlies WTO law is based ultimately on the fact of economic interdependence.³¹ It, too, is probably also the reason why countries themselves have been relatively uninterested in reform proposals put forward in the last decade by commentators like Kyle Bagwell, Petros Mavroidis and Robert Staiger who have suggested, for instance, that “stronger” remedies, or tradeable rights to retaliate, might be

to settle their differences by means of offers to settle. In many jurisdictions as well, the failure to accept a reasonable offer can have serious consequences for the intransigent party. For instance, see Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 49.10(1) (offers by plaintiffs) and 49.10(2) (offers by defendant).

²⁸ Mitigation is generally understood to be the doctrine in Anglo-American contract law that bars the plaintiff from recovering any damages for his or her loss which the claimant could have avoided. HUGH BEALE, *CHITTY ON CONTRACTS: VOL. 1*, at 1666 (30th ed., 2008).

²⁹ In tort, for instance, “The general object of an award of damages is to compensate the claimant for the losses, pecuniary and non-pecuniary, sustained as a result of the defendant’s tort.” CLERK & LINDSELL ON TORTS 1883 (Anthony M. Dugdale & Michael A. Jones eds., 20th ed., 2010).

³⁰ “[T]he traditional view was that specific performance would not be ordered where damages were an “adequate” remedy.” BEALE, *supra* note 28, at 1719.

³¹ Thus, for instance, in Panel Report, *EC – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.50, WT/DS27/R/USA (May 22, 1997) the Panel noted concerning rules of standing in WTO dispute settlement that “with the increased interdependence of the global economy, which means that actions taken in one country are likely to have significant effects on trade and foreign direct investment flows in others, Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly. Since the United States is likely to be affected by the EC regime, it would have an interest in a determination of whether the EC regime is inconsistent with the requirements of WTO rules. Thus, in our view a Member’s potential interest in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreement are each sufficient to establish a right to pursue a WTO dispute settlement proceeding.”

useful in the dispute settlement system.³² On the whole countries appear to be ready to accept the WTO dispute settlement system as it is. The aim is not stronger retaliation. Rather, it is to use “the substance of a conflict as a means of exploring options and establishing responses that are not only acceptable to all parties but develop and strengthen relationships among those involved.”³³

III. SOME POINTS OF COMPARISON

I have argued above that the character of WTO law and dispute settlement is exceptional, but not wholly so. There are other legal systems that emphasize the collective ethos and settlement. To some extent, settlement might even be deemed a characteristic of *all* legal systems inasmuch as law normally contemplates a state of peace among parties while disputes are the exception.

In international law, for instance, Henry Schermers and Niels Blokker have observed that members of an international organization are under a duty to behave as good members, “a duty which can be seen as part of a modern general principle of law: the duty to cooperate.”³⁴ Jan Klabbers has also pointed out that this duty is expressed in the constituent treaties of a number of IOs and goes beyond the usual duty to fulfill treaty obligations in good faith.³⁵ The problem with such a duty, however, is that it is rarely specific. There is a need for criteria that might concretize it when expressed as the duty to settle.

Two potential sources from domestic law are the fields of labour relations and indigenous treaty talks. In both, a “relational” element prevails that modifies the negotiating environment.³⁶ The parties’ proximity and the fact that they will have to continue working together point to a “public good” framework not unlike the one in WTO law. Parties are under an obligation to negotiate and settle their disputes in order to safeguard the peace — or greater good — inherent in their relationship.

In Canadian labour relations law, for instance, a rich jurisprudence has developed concerning the “duty to bargain”, which is defined by statute in

³² Kyle Bagwell *et al.*, *The Case for Tradable Remedies in WTO Dispute Settlement* (World Bank Policy Research Working Paper No. 3314, 2004).

³³ Law Commission of Canada, *From Restorative Justice to Transformative Justice: Discussion Paper*, (Law Commission of Canada Catalogue No. JL2-6/1999, 1999).

³⁴ SCHERMERS & BLOKKER, *supra* note 6, at 108.

³⁵ KLABBERS, *supra* note 8, at 175-76. Klabbers observes that “rather than merely confirming . . . *pacta sunt servanda*, such solidarity clauses remind the member states of organizations that they may be called upon which are not to their liking and which they may never even have expected”

³⁶ As originally identified and emphasized by Ian McNeil in the form of “relational contracting”. His canonical work in this respect is generally recognized to be Ian MacNeil, *The Many Futures of Contracts*, 47 SO. CAL L. REV. 691 (1974).

the *Canada Labour Code* as follows:

50. Where notice to bargain collectively has been given under this Part,
- (a) the bargaining agent and the employer, without delay, but in any case within 20 days after the notice was given unless the parties otherwise agree, shall
 - (i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and
 - (ii) make every reasonable effort to enter into a collective agreement.

What is noteworthy about experience under the domestic law of labour relations is that its principal preoccupations are, as we shall see, strikingly similar to those found in the duty to settle in WTO law.³⁷ First, there is the issue of what triggers the duty. This has been held to be notice to bargain given by either party. Throughout Canada all labour relations statutes specify the precise timing of such notices.³⁸

A second observation about the labour relations analogy is that the duty to bargain has been elaborated to prohibit certain specific conduct, such as misrepresentations, and at times has been interpreted to censure a party's entire bargaining stance where a decision-maker concludes that the real object of the party's behaviour is to avoid coming to a collective agreement. Nevertheless, an important point to note here — especially in the WTO context — is that an underlying philosophy of the duty to bargain as developed in Canadian labour law is that the duty embraces a “freedom of contract” rationale. That is, that the parties are best able to determine the content of their agreements themselves and, failing agreement, each party has recourse to economic sanctions.³⁹ In particular, Canadian cases reveal a reluctance among labour tribunals to review the “fairness” of proposals or, by way of remedy, to impose agreement. Tribunals therefore try to understand and honour the dynamic of power bargaining. They do not regard their role as being to redress imbalances of economic power between the parties.⁴⁰ Thus, save in exceptional circumstances, the requirement of “reasonable efforts” set out in the *Canada Labour Code* has generally not been applied to justify a searching review of the reasonableness of proposals that each side makes but instead has been used to mandate “rational discussion” and other reasonable procedural rules

³⁷ See generally GEORGE ADAMS, CANADIAN LABOUR LAW 10-105ff (2010).

³⁸ *Id.* at 10-106 n.492.

³⁹ *Id.* at 10-107.

⁴⁰ *Id.* at 10-108.

which are more likely to lead to a collective agreement.

A third observation is that while the specific statutory formula in Canadian law varies slightly from jurisdiction to jurisdiction, both the duty of good faith and the duty of reasonable efforts that comprise the duty to bargain have not been interpreted as *a duty to agree* or *a duty to a particular bargain*.⁴¹ Longstanding authority holds that there is no reason why the subject matter of bargaining should not include anything that is consistent with the law.⁴² As for tactics in the bargaining process, the highest duty appears to be to preserve the right of each party to safeguard its freedom respecting its bargaining position and to state its position on the matters in issue.⁴³ At the same time, decision-makers have taken the view that such a duty is only amenable to the most minimal legal enforcement, this being understood as enforcement of the obligation to meet and exchange positions.⁴⁴ Tribunals have made it clear that while they do not condone minimal adherence to standards of good faith bargaining, there is an overarching concern with writing into the law standards that are effectively unenforceable or that encourage either minimum bargaining or litigation.⁴⁵ Again, as we will see, this concern has clear parallels in WTO dispute settlement.

A fourth and final observation to be drawn from the experience of labour relations is that Canadian tribunals have held that there are some subjects on which bargaining is prohibited. This includes anything that is expressly contrary to law or what is traditionally considered to be under unilateral employer control. Thus, for instance, decisions on subcontracting and plant-closing decisions have been characterized as core management decisions and complaints based on them liable to dismissal.⁴⁶

Still, it is doubtful whether such highly evolved requirements of settlement can be effortlessly transposed into international law. Thus, another source of analogy for the duty to cooperate and settle, and one that, given its nature, is perhaps inherently somewhat closer to the model of WTO dispute settlement, is that of Canada's recent experience of negotiations with indigenous peoples. Canada's territory is home to more than 600 native tribes, or "bands", that represent the indigenous peoples who lived in Canada before the arrival of Europeans.⁴⁷ In many cases these

⁴¹ *Id.* at 10-110 (quoting from the *Woods Report on Labour Relations* (1968)).

⁴² *Id.* at 10-110 ("Subject – Matter of Negotiations").

⁴³ *Id.* at 10-110 (see *Woods Report*).

⁴⁴ *Id.*

⁴⁵ "Management decisions having as their focus only economic profitability are not subject to bargaining notwithstanding a direct impact on employment." *Id.* at 10-113-14.

⁴⁶ "The duty to bargain in good faith is measured by a subjective standard while the duty to make 'every reasonable effort to enter into a collective agreement' is measured by objective standards based on accepted standards and practices within the particular industry." *Id.* at 10-121.

⁴⁷ See Indian and Northern Affairs Canada, <http://www.ainc-inac.gc.ca/al/lde/index-eng.asp> (last visited Feb. 22, 2011).

peoples negotiated “treaties” with the English or French Crown several hundred years ago that allowed the government to obtain title to most of their lands. Each treaty delineated a tract of land which was thought to be the traditional territory of the First Nation or Nations signing the treaty.⁴⁸ In exchange for a surrender of their rights and title to these lands, the First Nations were promised a smaller parcel of land as a reserve, annual annuity payments, implements to either farm or hunt and fish, and the right to continue to hunt and trap, and in some cases fish, on the tract surrendered.

Today these peoples, like the indigenous peoples of Taiwan and elsewhere, have sought redress for outstanding claims related to these arrangements in the form of either comprehensive or specific claims.⁴⁹ Comprehensive claims deal with the unfinished business of treaty-making in Canada. These claims arise in areas where Aboriginal land rights have not been dealt with by past treaties or through other legal means. In these areas, forward-looking modern treaties are negotiated between the First Nation(s) in question, Canada and the province or territory. Specific claims deal with past grievances of First Nations.

In 1973 Canada first established policies on Aboriginal claims, along with processes and funding for resolving these claims through negotiation. These are optional processes that provide Aboriginal groups with an alternative to going to court to resolve their claims. The federal government takes the position that the claims process is in the best interest of all Canadians, Aboriginal and non-Aboriginal alike.⁵⁰ As a result, a number of negotiations on both comprehensive and specific claims are ongoing and the amount of land claims concluded to date is substantial.⁵¹ The process has also resulted in a number of new legal concepts, such as recognition of Aboriginal title and ongoing duties to negotiate among native peoples and the government.⁵²

The key here is, however, that these arrangements place an emphasis on *negotiation*. Parties know that they will be repeat players and will have to deal with each other on a continuing basis into the future. A modest body of case law has developed to define, and give content to, the duty to negotiate. At present, the duty appears to be less well-developed than in the labour relations context, probably because of the wide-ranging and delicate issues that the negotiations often touch upon and also because the courts have shown an awareness of the legacy of aboriginal-government relations, a legacy marked by both dependency and mistrust.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

In *Haida Nation v. British Columbia (Minister of Forests)*⁵³, for example, the Supreme Court of Canada recalled that there was longstanding recognition in Canadian law of a duty on the government to consult with indigenous people as part of the government's traditional fiduciary duty owed to indigenous people.⁵⁴ More recently, the Supreme Court has held that the duty to consult and accommodate is founded upon the honour of the government, which requires public officials, acting honourably, to participate in processes of negotiation with the view to effecting reconciliation between the government and Aboriginal people.

In *Haida*, the Chief Justice of Canada observed that the duty to consult arises: "[W]hen the Crown [i.e. the government] has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."⁵⁵

However, while knowledge of a credible but unproven claim suffices to trigger a duty to consult and, if appropriate, accommodate, the content of the duty varies with the circumstances.⁵⁶ Precisely what is required of the government may vary with the strength of the claim and the impact of the contemplated government conduct on the rights at issue. Thus, in a situation of minimal impact or where the claim to title is weak, "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised".⁵⁷ In *Haida* the Court said that "[C]onsultation" in its least technical definition is talking together for mutual understanding.⁵⁸ At the opposite end of the spectrum is the situation where the impact is likely high. Here, "[w]hile precise requirements will vary with the circumstances", the Court said that "the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the [final] decision."⁵⁹

⁵³ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 S.C.C. 73, [2004] 3 S.C.R. 511 (2004) [hereinafter *Haida*]. See also Sonia Lawrence & Patrick Macklem, *From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult*, 79(1) CAN. BAR REV. 252 (2000); Thomas Isaac & Anthony Knox, *The Crown's Duty to Consult Aboriginal People*, 41 ALTA. L. REV. 49 (2003); for similar work in the New Zealand context, see New Zealand Ministry of Justice, *A Guide for Consultation with Māori*, <http://www.justice.govt.nz/publications/publications-archived/1997/guide-for-consultation-with-maori/publication> (last visited Feb. 22, 2011).

⁵⁴ "The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty" *Roberts v. R.*, [2002] 4 S.C.R. 245, 2002 SCC 79 (S.C.C.), ¶ 79 (2002). The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations." *Haida*, *supra* note 53, ¶ 18.

⁵⁵ *Id.* ¶ 35.

⁵⁶ *Id.*

⁵⁷ *Id.* ¶ 43.

⁵⁸ *Id.*

⁵⁹ *Id.* ¶ 44.

In another case, *Gitanyow First Nation v. Canada*,⁶⁰ the hereditary chiefs of the Gitanyow First Nation, on Canada's West Coast, brought an action against the government seeking two declarations with respect to indigenous treaty negotiations, one of which provided that the federal government, having undertaken and proceeded to negotiate a treaty with the Gitanyow, was obliged to negotiate in good faith within the treaty process and make every effort to conclude a treaty that secures the Gitanyow rights. The Court granted the first declaration in part, but observed that since negotiations had yet to commence, "[t]he detailed content of the [government's] duty to negotiate in good faith is not determined at this stage." It also concluded, however, that in general the duty to negotiate must include at least the absence of any appearance of "sharp dealing," the disclosure of relevant factors, and negotiation "without oblique motive."⁶¹

IV. THE DUTY TO SETTLE IN WTO LAW: *U.S. – SHRIMP* AND *U.S. – CONTINUED SUSPENSION*

With these examples in mind, we are in a better position to assess what is actually happening in WTO law and the pronouncements made in relation to the duty to settle. I propose to look at outcomes in two WTO cases, *U.S. – Shrimp* and *U.S. – Continued Suspension*. These help to illustrate what issues and considerations have been raised in the actual practice of WTO dispute settlement.

In *U.S. – Shrimp* the matter at issue was a challenge by four countries of Section 609 of U.S. Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations (the "Revised Guidelines"). The U.S. law originally required certification, on a country-by-country basis, that shrimp operations were "turtle-friendly". The U.S. standard, negotiated with countries in the Western Hemisphere as part of the *Inter-American Convention for the Protection and Conservation of Sea Turtles*, was extended to the entire world by a decision of the U.S. Court of International Trade in 1996.⁶² The standard did not take account of domestic efforts to protect turtles. Rather, it effectively required that all countries apply the U.S. standard mandating the use of Turtle Excluder Devices (TEDs). After a WTO finding that the extension amounted to "unjustifiable discrimination" and "arbitrary discrimination" under the preamble of GATT Article XX, the United States took a cue from the Appellate Body's criticism of its failure to consult with its trading partners

⁶⁰ *Gitanyow First Nation v. Canada*, [1999] 3 C.N.L.R. 89 (B.C.S.C.) (1999).

⁶¹ *Id.* ¶ 74.

⁶² See details in Panel Report, *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 2.10, WT/DS58/R (May 15, 1998).

to conclude an *Indian Ocean and South East Asian Marine Turtle Memorandum of Understanding*.⁶³

In *U.S. – Continued Suspension* the matter at issue arose from an earlier dispute, *EC – Hormones*, where the U.S. and Canada challenged an EC ban on the importation of beef treated with certain growth promoting hormones. *EC – Hormones* involved the imposition of a 100% ad valorem duty by the U.S. and Canada on selected EC food products.⁶⁴ The retaliation remained in place until May 2009 when the U.S. and EU signed a Memorandum of Understanding (MOU) on the dispute.⁶⁵ The U.S. – EU MOU established a phase-in period over several years. In each phase the U.S. would be entitled to expanded market access for progressively greater amounts of U.S. High Quality (i.e. hormone-free) beef in the EU in exchange for a phase-out of the U.S. retaliation. The MOU is scheduled to conclude in May 2013.

In both *U.S. – Shrimp* and *U.S. – Continued Suspension* what was most notable were not the specific settlements achieved, but the indications made by panels and the Appellate Body as to what the duty to settle specifically entails. In addition, collective assistance was evident in the form of suggestions by other countries as to ways of settling the dispute.

As a result of U.S. efforts at compliance in *U.S. – Shrimp*, countries could apply for certification under U.S. law even if they did not require the use of TEDs. In such cases, a harvesting country had to demonstrate that it had implemented, and was enforcing, a “comparably effective” regulatory programme.⁶⁶ However, on the grounds that the U.S. had not implemented appropriately the recommendations of the DSB, Malaysia challenged the U.S. implementation pursuant to DSU Article 21.5 in October 2000.⁶⁷ The compliance panel found that:

⁶³ Indian Ocean and South East Asian Marine Turtle Memorandum of Understanding, June 23, 2001, (entered into force Sep. 1, 2003), which is negotiated under the Convention for Migratory Species of Wild Animal, June 23, 1979, 1651 U.N.T.S. 333, 19 I.L.M. 15.

⁶⁴ The retaliation was authorized pursuant to the arbitrator’s decision in *EC – Measures Concerning Meat and Meat Products* (22.6), WT/DS26/ARB (July 12, 1999).

⁶⁵ The terms of the U.S. settlement are reviewed and discussed in Renée Johnson & Charles E. Hanrahan, *The U.S. – EU Beef Hormone Dispute*, Congressional Research Service 7-5700/R40449, at 14 (Jan. 19, 2010). A settlement between Canada and the EC was announced in November 2010. See Agriculture and Agri-Food Canada, *New Duty-Free Access for Canadian Beef in European Union Market*, Nov. 23, 2010, http://www.agr.gc.ca/cb/index_e.php?s1=n&s2=2010&page=n1011 23 (last visited Feb. 22, 2011).

⁶⁶ Under the U.S. legislation, certification could also occur where the shrimp fishing environment did not pose a threat of incidental capture of sea turtles. This was because: 1. the relevant species of sea turtles did not occur in waters subject to that country’s jurisdiction; 2. in that country’s waters, shrimp was harvested exclusively by means that do not pose a threat to sea turtles, for example, any country that harvested shrimp exclusively by artisanal means; or, 3. commercial shrimp trawling operations take place exclusively in waters in which sea turtles did not occur.

⁶⁷ Panel Report, *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products (Recourse 21.5 by Malaysia)*, ¶ 5.94, WT/DS58/RW (June 15, 2001).

[I]n light of the recommendations and rulings of the DSB, Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the [United States] authorities, is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied.⁶⁸

It went on to urge:

Malaysia and the United States to cooperate fully in order to conclude as soon as possible an agreement which will permit the protection and conservation of sea turtles to the satisfaction of all interests involved and taking into account the principle that States have common but differentiated responsibilities to conserve and protect the environment.⁶⁹

An appeal of the compliance panel's decision was launched by Malaysia in July 2001. The appeal is interesting for its canvassing of several issues relevant to settlement. Among them were when the obligation to settle is exhausted, who must agree, and what the relevant benchmark should be.

Several third parties had concerns that mirror those evidenced in the shape of domestic law, seen above. Australia objected to the panel report, saying that the panel erred in its conclusion that simply entering into negotiations was enough to insulate the U.S. from a claim that it had failed to engage in good faith negotiations. Something more was required.⁷⁰ The EC emphasized that international cooperation "is a process and not a result."⁷¹ Such cooperation is necessarily based on reciprocal efforts to resolve a common concern in the mutual interest. To the EC it therefore appeared "that international cooperation requires as a minimum the exchange of data and readily available scientific knowledge between all interested parties."⁷² Japan submitted that "it seems logical to assume that by engaging in sufficiently 'serious good faith' negotiations and meeting other requirements, the United States has addressed 'arbitrary or unjustifiable discrimination'."⁷³ However, Japan went on to observe that

⁶⁸ *Id.* ¶ 6.1.

⁶⁹ *Id.* ¶ 7.2.

⁷⁰ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 122, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter *U.S. – shrimp* Appellate Body Report].

⁷¹ *Id.* ¶ 54.

⁷² *Id.* ¶ 55.

⁷³ *Id.* ¶ 67.

while “the notion of ‘serious’ and ‘good faith’ is subjective in nature, a more objective test, such as a common recognition by other negotiating countries on the necessity of the measure in question, may be needed”⁷⁴ Japan considered that the Panel should have explicitly indicated in its Report whether support for, or recognition of, the revised measure by *other countries* would play a part in satisfying the settlement requirement.⁷⁵

Malaysia had raised two main arguments on appeal:

1. the nature and the extent of the duty to pursue international cooperation in the protection and conservation of sea turtles, and
2. the flexibility of the Revised Guidelines. Malaysia’s position, as appellant, was that “demonstrating serious, good faith efforts to *negotiate* an international agreement for the protection and conservation of sea turtles is not sufficient to meet the requirements of the chapeau of Article XX.”⁷⁶

Malaysia maintained that the chapeau required instead the *conclusion* of such an international agreement.

With respect to the first issue the Appellate Body took the position that to avoid “arbitrary or unjustifiable discrimination” as per the chapeau of Article XX, the United States had to provide all exporting countries “similar opportunities to negotiate” an international agreement.⁷⁷ In particular, it stated that:

[G]iven the specific mandate contained in Section 609, and given the decided preference for multilateral approaches voiced by WTO Members and others in the international community in various international agreements for the protection and conservation of endangered sea turtles that were cited in our previous Report, the United States, in our view, would be expected to make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other.⁷⁸

However, the Appellate Body also stated that “the negotiations need not be identical.”⁷⁹ It added:

[N]o two negotiations can ever be identical, or lead to identical results. Yet the negotiations must be *comparable* in the sense

⁷⁴ *Id.* ¶ 68.

⁷⁵ *Id.*

⁷⁶ *Id.* ¶ 116.

⁷⁷ *Id.* ¶ 122.

⁷⁸ *Id.*

⁷⁹ *Id.*

that comparable efforts are made, comparable resources are invested, and comparable energies are devoted to securing an international agreement. So long as such comparable efforts are made, it is more likely that “arbitrary or unjustifiable discrimination” will be avoided⁸⁰

At the same time, the Appellate Body took a moderate position on the issue of whether or not the obligation to *negotiate* included a duty to *conclude* a settlement. It stated:

Requiring that a multilateral agreement be *concluded* by the United States in order to avoid “arbitrary or unjustifiable discrimination” in applying its measure would mean that any country party to the negotiations with the United States, whether a WTO Member or not, would have, in effect, a veto over whether the United States could fulfill its WTO obligations. Such a requirement would not be reasonable. For a variety of reasons, it may be possible to conclude an agreement with one group of countries but not another.⁸¹

The Appellate Body also disagreed with the panel that successful efforts by the U.S. to conclude an *Inter-American Convention* could in any way be considered a legal “benchmark”, or in other words, an objective standard. Instead, the Appellate Body focused on the particulars of the negotiations, observing that even though the projected agreement was voluntary (as opposed to legally binding) and not concluded at the time of the original compliance proceedings, the U.S. had actively undertaken negotiations and supported them financially.⁸² The *Inter-American Convention* was useful as an “example”⁸³ but differences in “factual circumstances have to be kept in mind.”⁸⁴

A second issue was flexibility: to what extent did the alleged “unilateral” measure of the U.S. have to be made pliant to other countries’ standards? Here, the neat question was whether flexibility in question was in relation to both means *and* results. The Appellate Body stated:

[T]here is an important difference between conditioning market access on the adoption of essentially the *same programme*, and conditioning market access on the adoption of a programme

⁸⁰ *Id.* (emphasis in original).

⁸¹ *Id.* ¶ 123 (emphasis in original).

⁸² *Id.* ¶ 132.

⁸³ *Id.* ¶ 133.

⁸⁴ *Id.* ¶ 132 (quoting the Panel Report at ¶ 5.83).

comparable in effectiveness. Authorizing an importing Member to condition market access on exporting Members putting in place regulatory programmes *comparable in effectiveness* to that of the importing Member gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve the level of effectiveness required. It allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory.⁸⁵

On this basis, and the fact that the U.S.’s revised legislation allowed for consideration of the specific circumstances in any exporting country, the Appellate Body concluded that “the Revised Guidelines, on their face, permit a degree of flexibility that, in our view, will enable the United States to consider the particular conditions prevailing in Malaysia”⁸⁶

A second case of interest to the obligation to settle is *U.S. – Continued Suspension*.⁸⁷ This was a case that, on its face, was very different from *U.S. – Shrimp*. Here the underlying dispute was considerably more mature. Positions had hardened and it might naturally be thought that the achievement of a settlement would be more difficult.

The specific “matter” in *U.S. – Continued Suspension* was provoked by certain actions of the EC to resolve the *EC – Hormones* dispute. That dispute, it will be recalled, had formally ended in April 1999 with WTO authorization to the U.S. and Canada to retaliate against the EC because of its failure to remove an import ban on hormone-treated beef. The Appellate Body held that the original ban failed to comply with SPS Article 5.1, which required the EC to conduct a risk assessment. In June 2003 the EC withdrew the original ban but immediately replaced it with legislation that continued to have the same effect. In the meantime, however, retaliation by the U.S. and Canada continued. The EC brought the *Continued Suspension* case on the basis that both the U.S. and Canada had failed to remove their retaliation despite the EC’s alleged removal of inconsistent measures, the unilateral determinations by both the U.S. and Canada that the replacement legislation was a continuing WTO violation, and the alleged failure of the U.S. and Canada to follow WTO dispute settlement procedures in continuing the ban.

Of particular concern in *U.S. – Continued Suspension* was the silence of DSU Article 22.8 on the termination of WTO retaliation. Who is entitled

⁸⁵ *Id.* ¶ 144. (emphasis in original).

⁸⁶ *Id.* ¶ 147.

⁸⁷ *U.S. – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320. Its companion case is *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321 (Mar. 31, 2008).

to make a determination that compliance has been achieved? The complainant? The defendant? WTO dispute settlement? And what obligations rest upon the parties to try and resolve disputes once retaliation has begun?

The procedural sequence of the case was a request by the EC for the establishment of a panel in January 2005. A panel report was issued in March 2008.⁸⁸ This was appealed and an Appellate Body report rendered in October 2008.⁸⁹ The Appellate Body began its analysis by observing the process-driven nature of WTO dispute settlement. WTO dispute settlement is conceived of as “a continuum of events” and cases alternate between dispute settlement and the DSB until substantive compliance is achieved.⁹⁰ However, the Appellate Body also observed that:

This does not mean that Members can remain passive once concessions have been suspended pursuant to the DSB's authorization. The requirement that the suspension of concessions must be temporary indicates that the suspension of concessions, as the last resort available under the DSU when compliance is not achieved, is an abnormal state of affairs that is not meant to remain indefinitely.⁹¹

In particular, the Appellate Body observed that:

Members must act in a cooperative manner so that the normal state of affairs, that is, compliance with the covered agreements and absence of the suspension of concessions, may be restored as quickly as possible. Thus, both the suspending Member and the implementing Member share the responsibility to ensure that the application of the suspension of concessions is “temporary”. . . . Where, as in this dispute, an implementing measure is taken and Members disagree as to whether this measure achieves substantive compliance, *both* Members have a duty to engage in WTO dispute settlement in order to establish whether the conditions in Article 22.8 have been met and whether, as a consequence, the suspension of concessions must

⁸⁸ Panel Report, *U.S. – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R (Mar. 31, 2008).

⁸⁹ Appellate Body Report, *U.S. – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R (Oct. 16, 2008) [hereinafter *U.S. – Continued Suspension Appellate Body Report*].

⁹⁰ *Id.* ¶ 7.64 (citing *Mexico – Corn Syrup (Article 21.5 – U.S.)*); *id.* ¶ 121.

⁹¹ *Id.* ¶ 310.

be terminated.⁹²

As to how this obligation to cooperate is to be activated, the Appellate Body stated:

[DSU] Article 21.5 does not indicate which party may initiate proceedings under this provision. Rather, the language of the provision is neutral on this matter, and it is open to either party to refer the matter to an Article 21.5 panel to resolve this disagreement. The text of Article 21.5, therefore, leaves open the possibility that *either* party to the original dispute may initiate the proceedings.⁹³

Thus, an underlying idea of collectivity and the communitarian value of prompt resolution prevails over continued suspension, implying that the obligation to end retaliation is a shared responsibility. And here a certain “mixing” occurs, a mixity that is perhaps best displayed in the Appellate Body’s comments as to the burden of proof. The usual rule as to the burden of proof in WTO law is stated in *U.S. – Shirts and Blouses* as follows: “[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.”⁹⁴

In *U.S. – Continued Suspension* the usual rule appears to be modified:

Much of the reluctance of the parties to secure a definitive determination in respect of Article 22.8 is the apprehension that, upon initiation, a party will attract the full burden of proof In our view, the allocation of the burden of proof, in the context of Article 22.8, should not be determined simply on the basis of a mechanistic rule that the party who initiates the proceedings bears the burden of proof. As we have indicated, in case of a disagreement, *both parties are under an obligation to secure a definitive multilateral determination as to whether the suspension of concessions must be terminated*. The burden of proof does not attach to a party simply because such party discharges this obligation. To hold otherwise would create a

⁹² *Id.* (emphasis added).

⁹³ *Id.* ¶ 347 (emphasis added).

⁹⁴ Appellate Body Report, *U.S. – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, at 13, WT/DS33/AB/R (Apr. 25, 1997).

disincentive to act in a manner which we consider to be obligatory and desirable.⁹⁵

These comments appear to reinforce the idea that settlement is a *joint* obligation of *all* the parties to a WTO dispute, and in some sense, of the WTO membership as a whole. This is reflected in the fact that there is considerable discussion in *U.S. – Continued Suspension* of the obligation to “have recourse to” and “abide by” WTO dispute settlement procedures in accordance with DSU Article 23 — itself a multilateral process.⁹⁶ Where a disagreement arises as to whether a measure found to be in violation has been removed, the Appellate Body indicated that “this disagreement must be resolved through Article 21.5 proceedings”.⁹⁷ Obviously, in the normal course, the original violator bears the burden of proving that the violation has in fact been removed, although the Appellate Body concluded that “[t]his does not mean that [the original complainants] do not have an obligation to engage in the dispute settlement procedures *in a cooperative manner*.”⁹⁸

V. CONCLUSION

Decisions in both *U.S. – Shrimp* and *U.S. – Continued Suspension* reveal that the duty to settle in WTO dispute settlement is a plurilateral, and to some extent multilateral, one. The duty rests in the first instance on the shoulders of the litigants but is also subject to multilateral review by the entire WTO membership under DSU Article 3.6. To date, few cases have formally raised the issue of review, probably because settlement practices are most often subject to “horse-trading” in the DSB.⁹⁹ This activity also tends to blur the permissive/prohibitive distinction to settlement seen in domestic labour law.¹⁰⁰ Nevertheless, a focus on settlement helps to correct

⁹⁵ *U.S. – Continued Suspension* Appellate Body Report, *supra* note 89 ¶ 359-60 (italics added).

⁹⁶ DSU Article 23 requires that WTO members have exclusive recourse to, and abide by, WTO dispute settlement results.

⁹⁷ *U.S. – Continued Suspension* Appellate Body Report, *supra* note 89, ¶ 389.

⁹⁸ *Id.* ¶ 409 (emphasis added).

⁹⁹ The structure of the DSU suggests that there is some intention to exercise multilateral surveillance of the solutions that are arrived at. This surveillance has in fact happened in several high-profile cases such as *EC – Bananas* where direct challenges have resulted to the settlements reached, but the reality is that surveillance takes time and resources are limited. It is probably impossible today for any one WTO member country to keep tabs on *every* settlement being concluded in the WTO legal system. We have to presume that only cursory attention is being paid and that a substantial amount is probably slipping through the WTO compliance net.

¹⁰⁰ A number of settlements arising out of WTO dispute settlement in fact have been WTO-inconsistent. A particularly illustrative example is that of the *Canada – U.S. Lumber* dispute, which began in March 2001 at the time of the expiration of the pre-existing *Softwood Lumber Agreement* between Canada and the U.S.. The expiration provoked a flurry of litigation in the WTO and elsewhere. The Government of Canada challenged different aspects of the DOC’s determinations

the (mis)impression that WTO law and WTO dispute settlement are only — or even primarily — about disputes.

I have argued in this article that the entire ethos of WTO law is heavily permeated with the obligation to settle and to observe obligations. This is a by-product of the law in question, a law established for the benefit of the membership as a whole. In *U.S. – Continued Suspension* the aversion to disputes disruptive of obligations was referred to by the Appellate Body, which termed the suspension of concessions “temporary” and “an abnormal state of affairs that is not meant to remain indefinitely”. Frequently, however, our attention to the “fireworks” of individual cases diverts attention away from this important goal. Often, we see WTO litigation purely in terms of litigation rather than the long-term aims it is meant to promote.

The emerging law of settlement emphasizes that while the duty to settle might be conceived of as largely *procedural* if appropriate domestic law analogies are accessed, in WTO law there has been some elaboration of what the duty entails *substantively*. It consists of a “soft” duty to negotiate, but as was pointed out in *U.S. – Shrimp*, this appears to involve more than simply entering into negotiations. Countries will be required to exchange data and readily available scientific knowledge, and to listen to each other’s positions. Although the case law has not dealt with this specific question yet, it is probable that some degree of failure to engage might amount to bad faith in WTO law.

At the same time, the duty to *negotiate* a settlement cannot be converted into a duty to *agree*. As was noted in *U.S. – Shrimp*, maintaining that a duty to negotiate is the same as a duty to agree gives a potential holdout the power to veto a country’s compliance with the WTO Agreement.

What of objective benchmarks? Where do we find reasonable standards for what settlement requires? In *U.S. – Shrimp* the Appellate Body emphasized the point that:

under the WTO Agreement and NAFTA Ch. 19, Canadian lumber producers challenged the U.S. decision not to refund anti-dumping duties as a violation of NAFTA Ch. 11, and both the Government of Canada and the Coalition for Fair Lumber Imports, part of the U.S. lumber lobby, engaged in follow-up litigation before U.S. courts. See Chi Carmody, *International Decisions*, 100(3) AM. J. INTL L. 664, 664-674 (2006). On 12 October 2006 the U.S. and Canada informed the DSB that they had reached a mutually agreed solution to all of their WTO litigation. In light of this mutually agreed solution, WTO action was withdrawn. This was despite the fact that the settlement reached was WTO-inconsistent in the sense that it imposed restrictions on imports of Canadian softwood lumber in violation of free trade commitments. Agreement on Safeguards, art. 11.1(b), Apr. 15, 1994, 1869 U.N.T.S. 154, states that “a [WTO] Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.” See also General Agreement on Tariffs and Trade (1994), art. XI, Apr. 15, 1994, 1867 U.N.T.S. 187.

[N]o two negotiations can ever be identical, or lead to identical results. Yet the negotiations must be *comparable* in the sense that comparable efforts are made, comparable resources are invested, and comparable energies are devoted to securing an international agreement. So long as such comparable efforts are made, it is more likely that “arbitrary or unjustifiable discrimination” will be avoided between countries where an importing Member concludes an agreement with one group of countries, but fails to do so with another group of countries.¹⁰¹

The Appellate Body was, however, reluctant to term what the U.S. had entered into with other countries a hard “benchmark”. Rather, it was referred to as an “example”. Still, in the circumstances of marine conservation it observed that “a multilateral approach is strongly preferred. Yet it is one thing to prefer a multilateral approach . . . it is another to require the *conclusion* of a multilateral agreement”¹⁰² Thus, there appears to be an important contextual element to settlement under the WTO Agreement, one which encourages the striking of a balance between bilateral, plurilateral and multilateral tensions underlying the treaty and depending on the subject matter involved.

The domestic law example of the duty to negotiate is helpful because it provides some idea of what WTO law might look like in future. Domestic labour law is much more developed than WTO law. It features, for instance, strict timelines about the duty to bargain, yet even here, courts are reluctant to impose settlements on parties. There is respect for the underlying power dynamic, something the organs of WTO dispute settlement appear to be acutely conscious of. What is perhaps most interesting in cases like *U.S. – Shrimp* is the way that other countries participating as third parties — Australia, the EC, Japan — appeared to contribute to a solution *sotto voce* by identifying issues and offering interpretations and solutions. There is, in other words, a communitarian aspect to the legal result.

Thus, what the law of settlement in the WTO emphasizes is a need for countries to be *actively involved with*, or what Martti Koskenniemi has referred to “authentically committed” to, international law.¹⁰³ Many legal systems foresee this kind of behaviour as the only one that will allow the law to work. There are fine limits to what written laws will achieve if the

¹⁰¹ *U.S. – shrimp* Appellate Body Report, *supra* note 70, ¶ 122 (emphasis in original).

¹⁰² *Id.* ¶ 124.

¹⁰³ MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 546 (2005). Koskenniemi says that authentic commitment, or what can be termed an “ethic of responsibility”, involves three features: “1. the accountability of each for the choices one makes, 2. the exercise of discretionary power so as [to] take account and fairly assess the widest range of consequences of one’s acts, and 3. responsiveness to the claims of others.”

spirit of the laws is not observed. In the *Dao deching* it is said that “the more laws are promulgated, the greater the number of thieves [Fa Ling Tzu Chang Tao Chei To Yu].”¹⁰⁴

The aphorism can be interpreted in a variety of ways. One way is to recognize that beyond a certain stage the formal law is exhausted and what becomes important is *li* (禮), “variously defined, in its totality, as ‘moral law’, as ‘customary, uncodified law, internalized by individuals’, as ‘the concrete institutions and the accepted modes of behaviour in a civilized state’, as the ‘moral and social rules of conduct’, as ‘propriety’ and as the ‘courtesy, customs and traditions we come to share . . . following the human Way’.”¹⁰⁵ Patrick Glenn has observed that “*li* is not passive deference to external patters. It is a *making* of society that requires the investment of oneself and one’s own sense of importance.”¹⁰⁶ So too with WTO law. The duty to settle stems from the need for countries to truly *apply* themselves to the process of making — and remaking — an international community expressed through law, and in the process, deepening and strengthening the bonds of those who are part of it.

¹⁰⁴ DAO DECHING, Ch. 57, Sentence 3.

¹⁰⁵ H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 328 (2010). *Li* is often contrasted with *fa* (法), the formal, codified law regarded in Confucian legal thinking as fixed and inflexible.

¹⁰⁶ *Id.* at 327.

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